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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72–1603

HAROLD J. CARDWELL, WARDEN, OHIO PENITENTIARY, PETITIONER

v.

ARTHUR BEN LEWIS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The United States has a direct interest in the standard governing the power of law enforcement officers to search and seize an automobile when they have probable cause to believe that the vehicle was used in the commission of an offense. Law enforcement officers employed by agencies of the United States, including the Metropolitan Police Force of the District of Columbia, frequently encounter situations similar to that at issue here. Moreover, an Act of Congress (49 U.S.C. 781, *et seq.*) expressly authorizes the warrantless seizure of a vehicle based upon probable cause to believe

that it has been used to transport contraband. The holding of the court of appeals, if sustained, may substantially affect the validity of that statute. Finally, to the extent that the case involves the standards to be employed generally in determining the validity of warrantless searches, it will have a substantial impact on a wide range of federal law enforcement activities.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises once again an issue which has sparked the "conflict that has been so notable in this Court's attempts over a hundred years to develop a coherent body of Fourth Amendment law" (*Coolidge* v. *New Hampshire,* 403 U.S. 443, 474). This conflict has been "caused by disagreement over the importance of requiring law enforcement officers to secure warrants" (*ibid.*). The underlying basis of that disagreement was summarized by Mr. Justice Stewart in *Coolidge* (*id.* at 474–475; footnotes omitted):

> Some have argued that a determination by a magistrate of probable cause as a precondition of any search or seizure is so essential that the Fourth Amendment is violated whenever the police might reasonably have obtained a warrant but failed to do so. Others have argued with equal force that a test of reasonableness, applied after the fact of search or seizure when the police attempt to introduce the fruits in evidence, affords ample safeguard for the rights in question, so that "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."

> Both sides to the controversy appear to recognize a distinction between searches and seizures that take place on a man's property—his home or office—and those carried out elsewhere. It is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of "exigent circumstances." As to other kinds of intrusions, however, there has been disagreement about the basic rules to be applied, as our cases concerning automobile searches, electronic surveillance, street searches and administrative searches make clear.

This case (unlike *Coolidge*) does not involve "a search or seizure carried out on a suspect's premises" and does not therefore implicate the "accepted * * * principle, that [such] a search or seizure * * * without a warrant is *per se* unreasonable, unless the police officer can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances'" (*ibid.*). Rather, it involves the kind of search and seizure with regard to which there has been uncertainty and disagreement "about the basic rules to be applied" (*id.* at 475). As Judge Gibson recently wrote in an opinion for the Court of Appeals for the Eighth Circuit (*United States* v. *Lawson*, 487 F. 2d 468, 470):

> The problem of automobile searches and their relationship to the warrant requirements of the Fourth Amendment has been a perplexing one for the courts. Without the assistance of defini-

> tive guidelines (indeed guidelines attempting to apply the general requirements of the Fourth Amendment in this area are likely to be of little assistance in the varying factual circumstances presented by concrete cases), the courts have attempted to apply general Fourth Amendment principles, assisted by what applicable language they could discern from the Supreme Court cases, to resolve situations probably never contemplated by the drafters of the Fourth Amendment or the courts. Lower courts have been hampered in this process by a seeming lack of consistency in the Supreme Court cases dealing with automobile searches, the inconsistencies no doubt being due to the manifold considerations that bear with unequal weight on varying aspects of the problem. * * *[1]

The issue presented here is whether the seizure of an automobile parked on a public parking lot, based upon probable cause to believe that it was used in the commission of a murder, is invalid because a warrant could have been obtained. It is an issue that has not been resolved by any holding of this Court. If the rule which has been "accepted" with regard to homes and like areas prevails here, and if what transpired here is deemed a search, then the seizure and "search" of the vehicle was invalid because no satisfactory reason appears for the failure of the law enforce-

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[1] See also *Cady* v. *Dombrowski*, 413 U.S. 433, 440, where the Court observed:

"While these general principles [regarding searches] are easily stated, the decisions of this Court dealing with the constitutionality of warrantless searches, especially when those searches are of vehicles, suggest that this branch of the law is something less than a seamless web."

ment officers to have obtained a warrant—there appears on the facts of this case to have been no real likelihood that respondent would have destroyed or concealed the evidence sought during the time required to seek and procure a warrant.[2] On the other hand, if the applicable test is dependent not on whether a warrant could have been obtained, but on "whether the search [or seizure] was reasonable" (*United States* v. *Rabinowitz,* 339 U.S. 56, 66), then the seizure of the vehicle was plainly lawful under the Fourth Amendment.

Our submission is that there is no support in the history or language of the Fourth Amendment for the view that every search or seizure—regardless of the nature of the privacy interest at stake—is invalid where a warrant could have been but was not obtained. In making this argument, we are not disputing

[2] This does not appear to be a case in which compliance with the requirement of prompt execution once a warrant is obtained (Ohio Rev. Code, § 2933.24) would have alerted a suspect to the fact that he was under suspicion and possibly have caused him to take evasive action which would have aborted the investigation before it was completed. Cf. *Hoffa* v. *United States*, 385 U.S. 293, 310. Indeed, no effort was apparently made to conceal from respondent that he was under investigation, and we do not understand the State to contend that the failure to obtain a warrant could be justified by fear that the delay incident thereto heightened the risk of removal of the car from the jurisdiction. Thus, a search warrant could have been obtained at the same time the arrest warrant was obtained.

One possible explanation for the failure to obtain a warrant, however, may be found in the Ohio statute regulating the issuance of search warrants, which authorized warrants only to search a "house or place" for various specified items, which may then be seized. Ohio Rev. Code, § 2933.21. Possibly the search of a car would not be viewed as the search of a "house or place."

what "is by now axiomatic, that the Fourth Amendment's proscription of 'unreasonable searches and seizures' is to be read in conjunction with its command that 'no Warrants shall issue, but upon probable cause,'" nor are we suggesting that "both the concept of probable cause and the requirement of a warrant" are not to be considered as bearing on the reasonableness of a search. *Almeida-Sanchez* v. *United States,* 413 U.S. 266, 277 (Powell, J., concurring). Rather, we submit that whether a search or seizure without a warrant should be held *per se* unreasonable depends on a determination whether the privacy interest at stake is of such magnitude that the interposition of a neutral and detached magistrate should be required to make the probable cause determination.

The classic example of such a *per se* unreasonable search is one involving the warrantless entry into a home. At common law, at the time of the adoption of the Constitution, it was settled that the privacy of the home could not be invaded except pursuant to a warrant, and then only to search for and seize stolen property. See *Entick* v. *Carrington,* 19 How. St. Tr. 1029, 95 Eng. Rep. 807. That restriction reflected the high regard for the integrity of a man's home, which has been traced back to biblical times (Lasson, *The History and Development of the Fourth Amendment to the United States Constitution,* pp. 13–14 (1937)), and which was reflected in Lord Coke's aphorism that "every man's house is his castle" (*Semayne's Case,* 3 Coke Rep. 91a (1604) (Fraser ed., pt. 5). It is for this reason that "the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of [a man's] home." *McDonald v. United States,* 335 U.S. 451, 455–456.

A search of an automobile, however, is "far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building. This Court 'has long distinguished between an automobile and a home or office.'" *Almeida-Sanchez* v. *United States,* 413 U.S. 266, 279 (Powell, J., concurring). As the Supreme Court of Michigan observed in an early automobile search case (*People* v. *Case,* 190 N.W. 289, 292):

> While [automobiles are a] possession in the sense of private ownership, they are but a vehicle constructed for travel and transportation on highways. Their active use is not in homes nor on private premises, the privacy of which the law especially guards from search and seizure without process.[2a]

Moreover, "[t]he greater part of the interior of a car is constantly within public view. Automobiles are consistently left with casual bailees who have complete control over the car for extended periods of time. Therefore, the privacy interest in the automobile may be sufficiently inferior to that of a home to justify permitting a less stringent procedure for search." Comments, *The Aftermath of Cooper* v. *California: Warrantless Automobile Search In Illinois,* 1968 U. Ill. Law Forum, 401, 410.

This observation is particularly pertinent to the facts of this case. Here the evidence sought to be suppressed—the paint samples (and related testimony)—was not the product of a search of the automobile. Indeed, the taking of paint samples, which may be likened to the taking of voice prints, fingerprint samples

[2a] See also, *People, ex rel. Winkle* v. *Bannan,* 125 N.W. 2d 875, 884–885 (Mich.); cf. *People* v. *Ubbes,* 132 N.W. 2d 669 (Mich.).

or handwriting exemplars, cannot be characterized as a search within the meaning of the Fourth Amendment. See *United States* v. *Dionisio*, 410 U.S. 1, 15; *United States* v. *Mara*, 410 U.S. 19. Cf. *Cupp* v. *Murphy*, 412 U.S. 291. Moreover, while the defendant's proprietary interest (as distinguished from his privacy interest) was interfered with by the taking of the car, that invasion—if unlawful (*i.e.*, without probable cause)—can be rectified by the return of the property and by some form of monetary compensation. The injury that results from an invasion of privacy, such as a forcible entry and search of a home, is largely irremediable. Accordingly, when all that is really at issue is the validity of a temporary detention of an item of personal property—an automobile—and not the validity of a search of any enclosed area in the interior of the vehicle or any packages in the car, there is even less necessity for the interposition of a neutral and detached magistrate to make the probable cause finding.[3]

We shall show that the approach we propose here—recognizing the lawfulness of warrantless probable cause seizures of automobiles not on private property, and permitting warrantless probable cause searches of automobiles in the absence of special circumstances particularly implicating privacy values—is not foreclosed by any holding of this Court, is consistent with the lan-

[3] The court of appeals held that even if the seizure of the automobile here could be justified, the taking of the paint samples was a search within the meaning of the Fourth Amendment because " 'layers of paint beneath the visible surface of the vehicle' " (Pet. App. 33–34) were examined. But such "metaphysical subtleties" (*Frazier* v. *Cupp*, 394 U.S. 731, 740) cannot realistically be said to transform an otherwise innocuous act into a violation of petitioner's right of privacy under the Fourth Amendment.

guage and history of the Fourth Amendment, and is in accord with procedures followed in England, where the law of search and seizure has evolved in much the same manner as our own law. We accordingly urge the adoption of this approach on the ground that it strikes a proper and desirable balance between the important interests of individual privacy protected by the Fourth Amendment and the legitimate objectives of proper law enforcement.

ARGUMENT

THE WARRANTLESS SEIZURE OF AN AUTOMOBILE, WHEN BASED ON PROBABLE CAUSE, IS NOT *PER SE* UNREASONABLE UNDER THE FOURTH AMENDMENT EVEN IF THERE WAS AN OPPORTUNITY TO OBTAIN A WARRANT

A. PAST HOLDINGS OF THIS COURT IN AUTOMOBILE SEARCH CASES LEAVE OPEN THE QUESTION HERE PRESENTED

The district court (Pet. App. 59) and the court of appeals, which adopted the rationale of the district court, found that the result in this case was mandated by the holding of this Court in *Coolidge* v. *New Hampshire*, 403 U.S. 443. We do not regard the holding of that case as controlling here. Contrary to the conclusion of the district court, the facts in *Coolidge* were not "substantially identical to those in the instant case" (Pet. App. 59). Unlike the instant case, where respondent's automobile was parked on a public parking lot, the automobile in *Coolidge* was parked adjacent to the defendant's home and could only be seized by "entering [his] private property" (403 U.S. at 463, n. 20). Part II–D of the opinion in *Coolidge*—the only relevant portion of the opinion which commanded a majority of the Court—is based on "[t]he most common situation in which Fourth Amendment issues have arisen," namely,

those "in which the police enter the suspect's premises, arrest him, and then carry out a warrantless search and seizure of evidence" (*id.* at 475). The thrust of that part of the opinion is devoted to answering the argument "that warrantless entry for purposes of arrest and warrantless seizure and search of a vehicle and *per se* reasonable, so long as the police have probable cause" (*id.* at 479).[4]

Moreover, in *Cady* v. *Dombrowski*, 413 U.S. 433, the Court distinguished *Coolidge* from the case before it—which involved the removal of an automobile from

[4] Mr. Justice Harlan, who cast the deciding vote, likewise viewed the case as involving "such an everyday question as the circumstances under which police may enter a man's property to arrest him and seize a vehicle believed to have been used during the commission of [an offense]." 403 U.S. at 490.

The same emphasis on the entry onto Coolidge's premises is also to be found in that portion of the opinion which did not command a majority of the Court. See, *e.g.*, *id.* at 461, n. 18, where the Court observed:

"But if *Carroll* v. *United States*, 267 U.S. 132, permits a warrantless search of an unoccupied vehicle, on private property and beyond the scope of a valid search incident to an arrest, then it would permit as well a warrantless search of a suitcase or a box. We have found no case that suggests such an extension of *Carroll*."

Again *id.* at p. 463, n. 20 (distinguishing *Chambers* v. *Maroney*, 399 U.S. 42, from *Coolidge*), Mr. Justice Stewart observed:

"The rationale of *Chambers* is that *given* a justified initial intrustion, there is little difference between a search on the open highway and a later search at the station. Here, we deal with the prior question of *whether* the initial intrusion is justified. For this purpose, it seems abundantly clear that there is a significant constitutional difference between stopping, seizing, and searching a car on the open highway, and entering private property to seize and search an unoccupied, parked vehicle not then being used for any illegal purpose. * * *"

the scene of an accident (and its subsequent search)—on the ground that the seizure and search in *Coolidge* was of an automobile "parked adjacent to the dwelling place of the owner" (413 U.S. at 446–447).[5]

It has, however, never been held that a warrantless seizure of an automobile based upon probable cause to believe that it was an instrumentality of a crime is invalid where no entry onto the owner's private property is necessary in order to seize the vehicle. *Preston* v. *United States,* 376 U.S. 364, and *Dyke* v. *Taylor Implement Co.,* 391 U.S. 216, both involved seizures and searches unsupported by a showing of probable cause. "In *Preston, supra,* the arrest was for vagrancy; it was apparent that the officers had no cause to believe that evidence of crime was concealed in the auto. In *Dyke, supra,* the Court expressly rejected the suggestion that there was probable cause to search the car, 391 U.S., at 221–222." *Chambers* v. *Maroney, supra,* 399 U.S. at 47. Indeed, in *Dyke* the Court expressly left open the issue whether the Fourth Amendment permits "a warrantless search, based upon probable cause, of an automobile which, having been stopped originally on a highway, is parked outside a courthouse" (391 U.S. at 222). Ultimately, that issue was resolved in *Chambers* v. *Maroney,* 399 U.S. 42, where it was held that such a

[5] Unlike this case, *Coolidge* also involved the validity of a "seizure * * * *and subsequent search* of Coolidge's Pontiac" (403 U.S. at 455). The taking of paint samples from the exterior of respondent's automobile is a markedly lesser intrusion than the full search of the interior of Coolidge's vehicle.

search does not violate the Fourth Amendment. There an automobile was stopped on a public highway and its occupants arrested. The vehicle was then brought to the station house and searched without a warrant (but with probable cause) at a time when the car was no longer movable and there were no exigent circumstances precluding procurement of a warrant. In rejecting the argument that the absence of a warrant invalidated the search of the vehicle, Mr. Justice White wrote (399 U.S. at 51–52);

> Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the "lesser" intrusion is permissible until the magistrate authorizes the "greater." But which is the "greater" and which the "lesser" intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.[*]

There is one fact that distinguishes this case from *Chambers*. There the vehicle was initially stopped on a public highway, speeding from the scene of the

[*] *Coolidge* v. *New Hampshire*, 403 U.S. 443, did not undermine the holding in *Chambers* v. *Maroney*, 399 U.S. 42. Rather, as noted (*supra*, p. 10, n. 4), it distinguished *Chambers* on the ground, *inter alia*, that *Coolidge* involved an entry onto "private property to seize and search" the automobile (403 U.S. at 463, n. 20).

crime, under circumstances in which it was practically impossible to obtain a warrant prior to the stopping (or seizure) of the vehicle but *not* prior to its search. Here, the vehicle was seized on a public parking lot, but it is clear that probable cause had evolved in sufficient time to permit procurement of the warrant prior to the seizure. Whether the seizure of the vehicle must be invalidated for this reason alone is a question that has not been determined by any holding of this Court.[7] See generally Annotation, *Validity, Under Federal Constitution, of Warrantless Search of Automobile—Supreme Court Cases*, 26 L. Ed. 2d 893.

B. THE FUNDAMENTAL POLICY OF PROTECTION OF PRIVACY INTERESTS EMBODIED IN THE FOURTH AMENDMENT WOULD NOT BE MEANINGFULLY ENHANCED BY ADOPTION OF A WARRANT REQUIREMENT FOR PROBABLE CAUSE SEIZURES OF AUTOMOBILES

The crucial police conduct on which this case focuses is the warrantless seizure of respondent's automobile, which the courts below deemed *per se* unreasonable despite the existence of probable cause clearly sufficient to have justified issuance of a warrant. As we argue, the taking of the paint chips from the car should not be deemed a search, since it entailed no meaningful intrusion into respondent's zone of privacy (as distinct from his property interest); the proper focus of inquiry should be on the validity of the seizure. The

[7] While we accordingly do not suggest that *Chambers* is controlling here, that decision is highly pertinent because the analysis there employed in determining whether a warrant should have been obtained was not based on any *per se* rule, but rested on whether there was a significant additional intrusion that should necessitate the interposition of a magistrate.

seizure of respondent's automobile under the circumstances of this case did not impinge upon the legitimate desire for and expectation of privacy that this Court has found to be the core interest protected by the Fourth Amendment. It follows that, although the Fourth Amendment's protection of the citizen against government action is not confined to privacy interests, its values are sufficiently protected in cases such as this by the general reasonableness requirement, without the need for antecedent interposition of a magistrate between law enforcement officials and their actions to deprive the citizen of possessory interest in an automobile.

1. In addition to the holdings of this Court in automobile cases, respondent relies on the following general principle outlined in *Katz* v. *United States,* 389 U.S. 347, 357:

> Searches conducted without warrants have been held unlawful "notwithstanding facts unquestionably showing probable cause," *Agnello* v. *United States,* 269 U.S. 20, 33, for the Constitution requires "that the deliberate, impartial judgment of a judicial officer * * * be interposed between the citizen and the police * * *." *Wong Sun* v. *United States,* 371 U.S. 471, 481–482. "Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes," *United States* v. *Jeffers,* 342 U.S. 48, 51, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the

Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.

An examination of the cases cited in *Katz*, however, shows the accuracy of the observation in *Coolidge* that this principle has gained general acceptance only in cases involving searches of individuals or homes, offices, hotel rooms and like areas,[8] where a substantial invasion of privacy is accomplished by a search which precedes the seizure of evidence. While *Katz* extended that principle to electronic surveillance not accompanied by a physical trespass, that determination was obviously influenced by the serious invasion of personal privacy involved in law enforcement through eavesdropping. Compare *United States* v. *Dionisio*, 410 U.S. 1, and *United States* v. *Mara*, 410 U.S. 19. Similar considerations govern searches of mail placed into the hands of postal authorities. *Ex parte Jackson*, 96 U.S. 727, 733.

[8] The cases cited in support of the *per se* rule in *Katz* were (389 U.S. at 357, n. 18): (1) *Jones* v. *United States*, 357 U.S. 493, 498, which held that if "federal officers [were] free to search without a warrant merely upon probable cause to believe that certain articles were *within a home*, the provisions of the Fourth Amendment would become empty phrases" (emphasis supplied); (2) *Chapman* v. *United States*, 365 U.S. 610, which held that a landlord could not authorize a warrantless entry into the apartment of his tenant; (3) *Stoner* v. *California*, 376 U.S. 483, 490, which held that "[n]o less than a tenant of a house, or occupant of a room in a boarding house * * *, a guest in a hotel room is entitled to [the] * * * protection against unreasonable searches and seizures." A fourth case, *Rios* v. *United States*, 364 U.S. 253, 261, involved a search and seizure of narcotics from a defendant who had been riding in a taxicab, where there was neither a warrant *nor* any showing of probable cause to justify the entry into the vehicle.

There are, however, no privacy interests at stake in this case. The temporary seizure of an automobile at most impinges upon the owner's proprietary interest in the vehicle; it does not override any substantial expectation of privacy he may have. While the Fourth Amendment protects more than just privacy from certain kinds of governmental intrusion, "and often ha[s] nothing to do with privacy at all" (*Katz* v. *United States, supra,* 389 U.S. at 350), "[t]he decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy." *Jones* v. *United States,* 357 U.S. 493, 498.

When no such interest is at stake and when the conduct of law enforcement officers does not touch on interests which implicate "the essential purpose of the Fourth Amendment," there is no necessity to invoke the most stringent protections which the Fourth Amendment accords to significant invasions of privacy.

Particularly apposite in recognizing this distinction between invasions of privacy and invasions of proprietary interests is *Hester* v. *United States,* 265 U.S. 57. There, law enforcement officers trespassed on to private property and found evidence of the defendant's wrongdoing. In holding that the law enforcement officers did not violate the Fourth Amendment, Mr. Justice Holmes wrote as follows for a unanimous Court (265 U.S. at 58):

> It is obvious that even if there had been a trespass, the above testimony was not obtained

> by an illegal search or seizure. The defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle—and there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned. This evidence was not obtained by the entry into the house and it is immaterial to discuss that. * * * The only shadow of a ground for bringing up the case is drawn from the hypothesis that the examination of the vessels took place upon Hester's father's land. As to that, it is enough to say that, apart from the justification, the special protection accorded by the Fourth Amendment to the people in their "persons, houses, papers, and effects," is not extended to the open fields. The distinction between the latter and the house is as old as the common law. 4 Bl. Comm. 223, 225, 226.

Similarly, in *United States* v. *Dionisio*, 410 U.S. 1, and *United States* v. *Mara*, 410 U.S. 19, it was held that the compulsory taking of handwriting exemplars, fingerprint samples and voiceprints was not limited by the Fourth Amendment because these acts involve " 'none of the probing into an individual's private life and thoughts that marks an interrogation or search'." (410 U.S. at 15). (This is, indeed, the only basis that appears to exist for the eminently sound distinction between "seizures" of voiceprints and electronic surveillance, which involves "seizures" of conversations.)

Most significant of all is the settled law, approved by implication by this Court in *Cooper* v. *California*, 386 U.S. 58, that warrantless seizures of vehicles used to transport contraband are valid if reasonable, without regard to whether a warrant could have been ob-

tained. Indeed, only eight months after it held that the law enforcement officers in this case had violated the Fourth Amendment, the Court of Appeals for the Sixth Circuit sustained (without reference to its decision in this case) the warrantless seizure of an unoccupied vehicle (parked on a public parking lot) based on probable cause to believe that it had been used to transport two counterfeit bills. *United States* v. *White*, No. 73-1301, decided December 13, 1973. The court of appeals held (slip op. at 3): "Existing authority supports the legal proposition that probable cause alone, without a warrant, is sufficient to justify the seizure of the automobile here in issue pursuant to 49 U.S.C. §§ 782 and 783."* Accord: *United States* v. *Stout*, 434 F. 2d 1264 (C.A. 10); *United States* v. *Francolino*, 367 F. 2d 1013, 1018-1023 (C.A. 2), certiorari denied, 386 U.S. 960; *Sirimarco* v. *United States*, 315 F. 2d 699, 701 (C.A. 10), certiorari denied, 374 U.S. 807; *United States* v. *Troiano*, 365 F. 2d 416, 418-419 (C.A. 3), certiorari denied, 385 U.S. 958; *United States* v. *Young*, 456 F. 2d 872, 875 (C.A. 8); *Lockett* v. *United States*, 390 F. 2d 168 (C. A. 9).

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*The court of appeals in *White*, relying on *Cooper* v. *California*, 386 U.S. 58, and *Cady* v. *Dombrowski*, 413 U.S. 433, then went on to uphold a search of the interior of the vehicle. Although it appears that there was not sufficient time to obtain a warrant to seize the vehicle in *White* prior to its discovery, there appear to have been no exigent circumstances precluding its procurement prior to seizure, and it seems plain that the holding did not turn on this fact. Indeed, *United States* v. *Troiano*, 365 F. 2d 416 (C.A. 3), cited with favor in *White*, was a case in which there was more than enough time to obtain a warrant.

This case, it is submitted, cannot reasonably be distinguished from the line of cases upon which the court of appeals relied in *White*. The forfeiture statute which authorized the warrantless seizure in *White* merely provides the legal justification for taking the vehicle, but it is conceded (and the holdings of the Ohio state courts confirm) that there was legal justification for seizing the vehicle here. The fact that there is some justification for seizing the vehicle thus does not resolve the issue of whether, regardless of the motive for seizure, the taking is to be deemed *per se* unreasonable absent a warrant or exigent circumstances.[10]

Realistically, therefore, the basis for sustaining the warrantless seizure of the vehicle in each case is the same—that the seizure alone does not impinge upon the fundamental values reflected by the Fourth Amendment. It is only a subsequent search of interior enclosed portions of the vehicle and packages or suitcases found therein that touches on those interests.[11] As the dissenters in *Cooper* v. *California*, 386 U.S. 58 (which involved the validity of a search of the vehicle after a warrantless seizure for forfeiture) stressed, "if [automobiles] can be searched without a warrant,

[10] We are frankly at a loss to understand how the court of appeals could apply more stringent requirements to police conduct in the course of the investigation of a brutal murder than it applies to essentially identical conduct motivated by a desire to enforce quasi-civil forfeiture laws.

[11] Although the law enforcement officers here examined the trunk of respondent's car, the validity of that conduct is not at issue. Even if that action were improper, it would not invalidate other lawful conduct. See *United States* v. *Artieri*, C.A. 2, No. 73-1771, decided January 23, 1974.

the precincts of the individual are invaded and the barriers to privacy breached" (386 U.S. at 65). Here, however, the seizure of the vehicle and the taking of paint samples did not "invade the precincts of the individual," nor did it "breach" the barriers to his privacy. Accordingly, the failure to obtain a warrant should not invalidate the taking of the paint samples.

2. Moreover, if this Court agrees with us that this case involves the validity only of a warrantless seizure, and that the taking of the paint samples did not constitute a search, the judgment of the court of appeals should be reversed even if the Court holds that a warrant is normally required for a seizure of an automobile. The State contended before the district court that respondent had consented to the seizure of his automobile by the police. There was conflicting evidence on this question, which was never resolved by the district court, because it viewed the taking of the paint sample as a search, and it found that the evidence "established, at most, that [respondent] consented to their taking custody of the car for safekeeping * * * [and not] for purposes of a search" (Pet. App. 54–55). Thus, if the Court concurs in our contention that the taking of the paint samples, which indisputably was amply justified by probable cause, was not itself *per se* unreasonable because done without a warrant (*i.e.*, that the investigators could have gone to the place where respondent's automobile was parked and removed a paint sample without a warrant), a showing of consent to police custody of the vehicle would suffice to sustain the lawfulness of the taking of the paint sample after the seizure.

C. THE HISTORY OF THE FOURTH AMENDMENT FULLY SUSTAINS THE VIEW THAT A WARRANT IS NOT ESSENTIAL TO THE VALIDITY OF AN OTHERWISE REASONABLE SEARCH AND SEIZURE OF A VEHICLE

Under the foregoing analysis, it would not be necessary for the Court, in deciding this case, to reach the more difficult general issue of the validity of warrantless searches of the interior of a vehicle. Should it be necessary to resolve this issue, however, it is our submission that, although such a search may involve some invasion of privacy, the extent of the invasion is ordinarily not such as to necessitate the interposition of a neutral and detached magistrate. The preceding discussion has shown that this issue has not been resolved by any holding of this Court. On the contrary, in those instances in which a warrant has been held necessary—none of which involved automobiles except *Coolidge*—the invasions of privacy were far more substantial than that present in a search of the interior of an automobile parked on a public street or entrusted to a bailee. We now show that neither the history nor the language of the Fourth Amendment sustain imposition of a *per se* warrant requirement for automobile searches, and that this view is in accord with English law.

1. The history and evolution of the Fourth Amendment has been well documented in the decisions of this Court [12] and in scholarly treatises,[13] and there is no

[12] See, *e.g.*, *Stanford* v. *Texas*, 379 U.S. 476, 481–485; *Marcus* v. *Search Warrant*, 367 U.S. 717, 724–729; *Frank* v. *Maryland*, 359 U.S. 360; *Harris* v. *United States*, 331 U.S. 145, 157–161 (dissent); *Boyd* v. *United States*, 116 U.S. 616, 624–629.

[13] Taylor, *Two Studies in Constitutional Interpretation*, pp. 3–46 (1969); Lasson, *History and Development of the Fourth Amendment of the United States Constitution*, pp. 13–105 (1937).

need to repeat this material at length here. Suffice it to say that the principal intent of the Framers (if not their only intent) was to bar forever the general warrants under which entries into the home were authorized without probable cause to believe that a crime had been committed or that evidence would be found. Such warrants were condemned by the English courts, and it was the intent of the Framers to write that condemnation into the Fourth Amendment. As Mr. Justice Stewart wrote for the Court in *Stanford* v. *Texas*, 379 U.S. 476, 481, 484 (emphasis added; footnotes omitted):

> These words [of the Fourth Amendment] are precise and clear. They reflect the determination of those who wrote the Bill of Rights that the people of this new Nation should forever "be secure in their persons, houses, papers, and effects" *from intrusion and seizure by officers acting under the unbridled authority of a general warrant.* Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws. They were denounced by James Otis as "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book," because they placed "the liberty of every man in the hands of every petty officer."
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> * * * * *

> * * * In an opinion which this Court has characterized as a wellspring of the rights now protected by the Fourth Amendment, Lord Camden declared the [general] warrant to be unlawful. "This power," he said, "so assumed by the secretary of state is an execution upon all the party's papers, in the first instance. His house is rifled; his most valuable secrets are taken out of his possession, before the paper for which he is charged is found to be criminal by any competent jurisdiction, and before he is convicted either of writing, publishing, or being concerned in the paper." *Entick* v. *Carrington* [19 How. St. Tr. 1029, 1064]. Thereafter, the House of Commons passed two resolutions condemning general warrants, the first limiting its condemnation to their use in cases of libel, and the second condemning their use generally.

The historical background is confirmed by the "legislative history" of the Fourth Amendment. In proposing the adoption of that provision, James Madison's statement to the House of Representatives directed its attention solely to the problem of general warrants:

> The General Government has a right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the discretion of the Legislature: may not general warrants be considered necessary for this purpose, as well as for some purposes which it was supposed at the framing of their constitutions the State Governments had in view? If there was reason for restraining the State Governments from exercising this power,

there is like reason for restraining the Federal Government."[14]

Accordingly, the original draft of the Fourth Amendment, as revised in minor, stylistic particulars by the Committee of Eleven reflected only the concern about general warrants. It provided:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized.[14a]

An amendment was then proposed by Representative Benson of New York (1 Annals of Congress, 1st Cong., 1st Sess., p. 754):

> Mr. Benson objected to the words "by warrants issuing." This declaratory provision was good as far as it went, but he thought it was not sufficient; he therefore proposed to alter it so as to read "and no warrant shall issue."
>
> The question was put on this motion, and lost by a considerable majority.

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[14] 1 Annals of Congress, 1st Cong., 1st Sess., p. 438. In a letter to George Eve written a few months earlier, Madison wrote:

> [I]t is my sincere opinion that the Constitution ought to be revised, and that the first Congress meeting under it ought to prepare and recommend to the States for ratification the most satisfactory provisions for all essential rights, particularly the rights of conscience in the fullest latitude, the freedom of the press, trials by jury, security against general warrants, etc. * * * [*Letters and Other Writings of James Madison*, Vol. 1, pp. 446–447 (1865)].

[14a] 1 Annals of Congress, *supra*, at p. 754.

As described by Lasson, *supra,* at pp. 101–102, the following then took place:

> [O]n August 24, when Benson as chairman of a Committee of Three, which had been appointed to arrange the amendments, reported an arrangement of the amendments as they were supposed to have been agreed upon by the House, the *clause appeared as he had proposed it and as the House had rejected it.*
>
> And so it stands today. The records do not show that the alteration was ever noticed or assented to as such by the House. In this form it was received and agreed to by the Senate. And the only remaining discussion by the House and Senate concerned those amendments upon which the two houses were not in accord. [Emphasis in original; footnotes omitted.]

While the language of the Fourth Amendment plainly affords protection against both unreasonable searches and seizures *and* the general warrants, there is no support for the view that the Framers intended that every search undertaken without a warrant would be *per se* unreasonable if a warrant could have been obtained. Quite the contrary—it may be inferred from legislation enacted by the very Congress which drafted the Bill of Rights, and by other early Congresses, that whether a warrant was necessary was dependent upon the nature of the invasion of privacy. As Chief Justice Taft observed in *Carroll* v. *United States, supra,* 267 U.S. at 150–152:

> It is noteworthy that the twenty-fourth section of the Act of 1789 [1 Stat. 29, 43] provides:

"That every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority, to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods, wares or merchandise; and if they shall have cause to suspect a concealment thereof, in any particular dwelling-house, store, building, or other place, they or either of them shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial; and all such goods, wares, and merchandise, on which the duties shall not have been paid or secured, shall be forfeited."

* * * * *

Again, by the second section of the Act of March 3, 1815, 3 Stat. 231, 232, it was made lawful for customs officers not only to board and search vessels within their own and adjoining districts, but also to stop, search and examine any vehicle, beast or person on which or whom they should suspect there was merchandise which was subject to duty or had been introduced into the United States in any manner contrary to law, whether by the person in charge of the vehicle or beast or otherwise, and if they should find any goods, wares or merchandise thereon, which they had probable cause to believe had been so unlawfully brought into the country, to seize and secure the same,

and the vehicle or beast as well, for trial and for forfeiture. * * *[15]

Although in *Carroll* Chief Justice Taft attributed the distinction drawn between houses and vehicles in the foregoing legislation (and in subsequent statutes enacted during the early years of the Republic), to the movability of vehicles and the consequent impracticability of obtaining a warrant (267 U.S. at 151, 153), that was not likely to have been the only explanation. Certainly the statutes permitted warrantless searches without regard to whether there was any reason to believe the vessel or vehicles would in fact be moved before a warrant could be obtained. Moreover, the statutes only required that there be "reason to suspect" that contraband would be found in the vehicles. The latter precondition—allowing searches on less than probable cause—could hardly be explained by the fact the vehicles were movable.[16]

[15] Moreover, the Act of March 3, 1815, contained the following proviso in Section 2:

Provided always, that the necessity of a search warrant, arising under this act, shall in no case be considered as applicable to any carriage, wagon, cart, sleigh, vessel, boat or other vehicle of whatever form or construction, employed as a medium of transportation, or to packages on any animal or animals, or carried by man on foot."

The 1815 statute bears marked similarities to the statute (8 U.S.C. 1357(a)(3)) at issue in *Almeida-Sanchez* v. *United States*, 413 U.S. 266, differing principally in that it arguably required some suspicion to justify the stop and search. The President who signed the 1815 statute into law was, of course, James Madison.

[16] We do not suggest that an eighteenth or nineteenth century view of reasonableness ought to control today (see, *e.g.*, *Warden* v. *Hayden*, 387 U.S. 294), "[b]ut recognition of that reality does not liberate us from all historical restraint." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 256 (Powell, J., concurring). In other words, reversal of the court of appeals here would entail

The language and history of the Fourth Amendment, therefore, are entirely consistent with our submission that the necessity for a warrant should be determined on the basis of the nature of the privacy interests at stake and not by any *per se* rule that if a warrant could be obtained, then it must be obtained.

2. The foregoing discussion has shown that the Fourth Amendment was basically intended to reflect the English law of the time. And, indeed, the law of search and seizure in England—except for the absence of an inflexible exclusionary rule—has evolved in much the same manner as our own. See, *e.g.*, *King* v. *Reginam*, 1 A.C. 304, 2 All Eng. Rep. 610 (1968); *Chic Fashions, (West Wales) Ltd.* v. *Jones*, 2 Q.B. 299, 1 All Eng. Rep. 232 (1968). Indeed, it is if anything more stringent in some respects. See *Ghani* v. *Jones*, 1 Q.B. 693, 3 All Eng. Rep. 1700, 1702 (1969).

It is therefore of some relevance to observe that under English law today a search and seizure of the kind at issue here would be valid without a warrant. The standards for such a search and seizure were set out by Lord Denning, M.R., in *Ghani* v. *Jones*, *supra*, 3 All Eng. Rep. at 1705:

> *First*, The police officers must have reasonable grounds for believing that a serious offence has been committed—so serious that it

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no dilution of the requirements of probable cause to support a search or seizure; it merely would entail, with respect to the theory we present in this portion of our argument, a refusal to extend to automobiles the presumption of *per se* unreasonableness applied to warrantless searches of houses.

is of the first importance that the offenders should be caught and brought to justice.

Secondly. The police officers must have reasonable grounds for believing that the article in question is either the fruit of the crime (as in the case of stolen goods) or is the instrument by which the crime was committed (as in the case of the axe used by the murderer) or is material evidence to prove the commission of the crime (as in the case of the car used by a bank raider or the saucer used by a train robber).

Thirdly. The police officers must have reasonable grounds to believe that the person in possession of it has himself committed the crime, or is implicated in it, or is accessory to it, or at any rate his refusal must be quite unreasonable.

Fourthly. The police must not keep the article, nor prevent its removal, for any longer than is reasonably necessary to complete their investigations or preserve it for evidence. If a copy will suffice, it should be made and the original returned. As soon as the case is over, or it is decided not to go on with it, the article should be returned.

Finally. The lawfulness of the conduct of the police must be judged at the time, and not by what happens afterwards."[17]

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[17] Although the opinion sets out these rules in the context of a case in which no arrest had yet taken place, it does not appear that this fact is critical except that a less stringent standard would presumably apply to a search incident to an arrest. See, *e.g.*, *Elias* v. *Pasmore*, 2 K.B. 164, 172 (1934).

The seizure and search here fully complied with these standards.

3. In conclusion, it should be noted that we are not suggesting that the reasonableness of an automobile search is always sustainable simply upon a showing of probable cause and that a warrant can never be required regardless of the surrounding circumstances. There may be circumstances in which important privacy interests are materially implicated and in which a strict warrant requirement ought to be imposed. But there is nothing remotely approaching such interests at stake here.

Moreover, we believe it is unlikely that adoption of our contentions would result in any increase in unlawful conduct by law enforcement officers, or that adoption of the contrary view is necessary for purposes of prophylaxis. The exclusionary rule remains applicable in full force to unreasonable automobile searches, and police continue to have substantial incentive to seek a warrant in any doubtful case, in view of this Court's announced policy of rewarding such action in evaluating close questions of probable cause. See *United States* v. *Ventresca*, 380 U.S. 102, 106.

CONCLUSION

The conduct of the law enforcement officers in seizing respondent's automobile without a warrant did not violate the Fourth Amendment because the seizure and the taking of samples did not involve substantial invasion of his privacy. Accordingly, it is respectfully

submitted that the judgment of the court of appeals should be reversed.

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